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THE "PAROL EVIDENCE" RULE.

I.

FEW things in our law are darker than this, or fuller of subtle difficulties. It appears to me that the chief reason for it is that most of the questions brought under this rule are out of place; it is true, in a very great degree, that a mass of incongruous matter is here grouped together, and then looked at in a wrong focus. Because the rule deals with *evidences*, with writings, — things the nature of which it is to be evidence of what they record, — it is assumed that it belongs to the law of evidence. But in truth most of the matters with which it is concerned have nothing to do with the law of evidence. It heightens the confusion, however, to find that some of them do belong there.

How, then, shall one find his way out of these perplexities? By coming to some clear conception of what the law of evidence is; by eliminating those parts of the subject which do not belong under that head, and allotting them to their proper place; and by tracing the development and true proportions of what remains. Let me try, although very imperfectly, to help a little towards accomplishing this result.[1]

I. It is necessary to keep in mind a few discriminations. 1. Between rules of substantive law and rules of evidence. When the

[1] For an attempt to indicate the nature of the law of evidence, the reader is referred to 3 Harvard Law Review, 142–7, and Thayer's Cases on Evidence, 1–4.

law requires a thing to be recorded, or to be in writing or under seal, or attested by witnesses, these are provisions of the substantive law; they are not requirements of the law of evidence. These are matters of form required in some cases as necessary to the constitution of a thing, in some required in order that it may be available as the ground of an action, and in some that it may be provable. In either case they belong to the substantive law of the particular subject. When, therefore, testimony or facts offered in evidence are rejected as not conforming to any one of these or the like requirements, it is the substantive law of the case that excludes them.[1]

2. We must, therefore, discriminate between different senses in which the word "evidence" is used. In the sense which gives name to the great and quite peculiar department of law which is known among English-speaking people as their "law of evidence," this word means testimony, or some matter of fact regarded as a thing to be offered to a legal tribunal as a basis of inference in ascertaining some other matter of fact. It does not include all that relates to the general topic of proof or legal reasoning, or all that is popularly meant by the word "evidence," — all evidential matter, — but only such as it is necessary to offer for use in court when a tribunal has to ascertain a matter of fact unknown or disputed. The rules of evidence regulate this particular judicial function. They do not determine questions of mere logic or general experience, or furnish rules for conducting processes of reasoning. To talk of evidence, then, and to settle questions about it, in the mere sense of a logically probative quality, is not to touch upon the region belonging to the law of evidence; indeed, to talk of it at all, unless with reference to its use for the purposes of litigation, is not to talk of what belongs to this specific department of our law. When we speak of certain writings as "evidences of debt," or of ownership, or of writings generally as "written evidence," and what is not in writing as "extrinsic evidence" or "parol evidence," we are, for the most part, not using the word "evidence" in any sense apposite to the law of evidence. Is it this head of the law that makes a bond or negotiable paper or other writing to be an evidence of debt, or a bill of lading evidence of ownership? Is it the law of evidence which requires a

[1] I found my judgment on one of the most useful rules in the law, viz., that when parties have put their contract into writing, that writing determines what the bargain is. — *Martin, B.*, in Langton *v.* Higgins, 4 H. & N. 402.

will, or a deed, or a contract about land, to be in writing? And is it the law of evidence which is appealed to in determining all the various implications and corollaries of these requirements? — as, *e. g.*, in deciding when the parol or extrinsic matter submitted is or is not consistent with the rule that you must have a specialty, or that what you rely upon shall be *intrinsic* in the writing?

3. Furthermore, it is necessary to remember in a thousand cases, when it is said that "evidence is admissible," or the reverse, that this "admissibility" has no necessary relation to the law of evidence. For in such cases the admission or rejection of what is offered rests, far oftener than not, on different grounds. It may turn on a doubt as to the mere logical quality of what is offered, or as to the true limits of the governing propositions of substantive law, pleading, or procedure, which in every case must fix the character of what is put forward as being relevant or the reverse. Neither of these situations presents a question in the law of evidence. If the inquiry be merely whether a matter admitted to be logically probative is excluded by any general rule from being used in court as a basis of inference, then you have a question in the law of evidence. But our books are full of statements and decisions that certain evidence is or is not admissible, which, if justly analyzed, are merely enunciations of a conclusion of logic or general experience, or of the substantive law in its various branches, or of the law of pleading or procedure.

Where a declaration as to the admissibility of evidence is clearly not an assertion as to a point in substantive law, pleading, or procedure, it is very often merely a single specimen, out of myriads that might be offered, of probative matter *not* excluded by the law of evidence. Such propositions are often put as if they declared a rule or doctrine in the law of evidence. When Wigram, in his well-known treatise on the "Admission of Extrinsic Evidence in Aid of the Interpretation of Wills," says, in his fourth proposition, that in order to aid in deciphering a will, etc., "the evidence of persons skilled in deciphering writing . . . is admissible to declare what the characters are," and in the fifth proposition that "for the purpose of determining the object of a testator's bounty . . . the court may inquire into every material fact," etc., he is not laying down any rule in the law of evidence, he is merely *illustrating* the subject by showing that the law of evidence has no precept about it. And generally, as regards this valuable little book, which is widely supposed to contain a considerable number of rules of evi-

dence, the real truth is that while it lays down some rules of construction, it points out that there is but one single rule of evidence involved in the whole discussion; namely, that which is stated in its proposition vi., with the exceptions in proposition vii.[1] Little reflection is needed to see that such things, *mere instances of what is provable*, are but so many illustrations and applications of the fundamental conceptions in any rational system of proof; namely, that what is logically probative and at the same time practically useful may be resorted to, unless forbidden by some rule or principle of the law. These instances may be multiplied and heaped up in countless numbers. They are, in fact. And yet he who does this is merely illustrating, often with a benumbing superfluity, the practical working of the principles of reasoning or the law of evidence; he is not stating these principles or rules.

4. Again, it is important to notice that rules which declare *the effect* of probative matter do not belong to the law of evidence. For example, when it is declared that certain facts create an estoppel, or that, as evidence, they are conclusive, or that they make a *prima facie* case, or create a presumption, such propositions amount to saying that, as regards this or that specific question, such and such facts are legally equivalent to certain others, either absolutely or *prima facie*. This may be so either for the purposes of the substantive law or of the law of procedure. Of course if such is their legal effect, then the proof of them is, for the given purpose, tantamount to the proof of the facts that they stand for.[2] One may get an exact notion of the use of rules of presumption in their relation to evidence by observing Lord Blackburn's handling of the case of Anderson *v.* Morice.[3] Compare Lord Coleridge's opinion in Ogg *v.* Shuter,[4] where the case is discussed merely upon a balancing of the evidence.

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[1] "Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended. . . . Courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (*i.e.*, the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." As to Wigram's meaning when he speaks of proving intention, see sections 9 and 10 of his book.

[2] See 3 Harvard Law Review, 141.

[3] L. R. 10 C. P. 614.

[4] L. R. 10 C. P. 159.

The statement, then, that anything is conclusive evidence is not one for which the law of evidence is responsible. It may be a thing very important to be known in handling evidence, but in that respect it is not essentially different from the ordinary rules of substantive law and procedure governing the particular case.

5. Another discrimination to be observed is that between documents which *constitute* a contract, fact, or transaction, and those which merely certify and evidence something outside of themselves, — a something valid and operative, independently of the writing. Brunner, in a learned consideration of the subject of "Documents," has incidentally pointed out this discrimination with precision while speaking of documents in the old Italian law, and of their nomenclature, — (1) *carta* or *cartula*, and (2) *notitia* or *memoratorium*. He quotes[1] a Lombard document of the ninth century which sets forth a promise *per wadiam* to give by a *carta* a piece of land in exchange; and goes on to remark that by the Lombard law a binding contract is concluded by the giving of the pledge (*wadia*);[2] and that as regards the legal effect of the transaction, the giving of a document is unimportant. The document in such cases is only written testimony of a transaction already valid and complete without it. It is merely an evidence document. "The *carta*, on the other hand, has a twofold office. It is both a means of proof and a means of constituting the transaction which it authenticates. It is used in legal matters which are accomplished only by means of the document. As constituting the contract, it takes the place of the *wadia;* as authenticating the contract, it unites with the function of the *wadia* that of the *notitia*." Such documents, he adds, are called "dispositive." "The *carta*, as contrasted with the mere evidence document, is a dispositive document."

This distinction finds abundant illustration in our own law, old and new. In 1422[3] a plaintiff sued in account for money received to his use; the defendant pleaded that he had given a deed to the plaintiff testifying the receipt of the money, and insisted that the plaintiff must make profert of the deed. Babington, J., at first seemed to agree with the defendant, on the ground that otherwise the plaintiff might recover twice by suing again on the deed; and he put the case of one owing twenty pounds on a simple contract,

[1] Urkunden, 15–17. See "The Early History of Negotiable Instruments," 9 L. Quart. Rev. 70.

[2] See Essays in Anglo-Saxon Law, 190.

[3] Y. B. 1 H. VI. 7, 31; Fitz. *Acc.* 1; *semble* s. c. Y. B. 2 H. VI. 9, 5.

and afterwards making a bond for the same twenty pounds (*sur le contract*); such a one, he said, shall be discharged from the contract by the obligation; and if an action be brought afterwards on the contract he may plead that for the same contract and the same money the plaintiff has a bond; and the reason for this, he said, was because otherwise a man would be twice charged for the same debt. Rolfe, counsel for the plaintiff, in answer put the case of lending a horse by an indenture, and afterwards bringing an action of debt on the loan without showing the indenture; clearly, he said, the borrower has no such plea as this, that the lender has an indenture on the same contract, because the indenture *merely testifies the contract*, and so in this case the deed merely testifies the receipt. "As to the case you put," he goes on, "of a bond, I entirely agree; for the contract and the obligation are two different contracts, and by the greater I am discharged from the less. But in the case of the receipt and the deed which witnesses the receipt there is but one contract."[1] In 1460,[2] on occasion of a question put to the judges by the Recorder of London, it appeared that one had sued in debt for a sale of cloth, and the defendant would wage his law; upon which the plaintiff set up a custom of London that the defendant should be ousted of his law if the plaintiff put forward "a paper or parchment written and sealed with the defendant's seal, which proves the contract." The plaintiff did make profert of such a paper, testifying that the defendant had agreed to the contract. Laken, serjeant, said that the action should have been brought on the paper, and not on the contract; but Prisot, C. J., thought otherwise. "The contract," he said, "is not determined by this. It is determined where one makes a bond upon a contract, or if a man recovers in debt upon a contract. Here no bond is shown, but only a paper testifying the contract. If I bail goods by deed indented," he added, "and afterwards bring detinue for them, I am not to count on the indenture, for that is only a thing testifying the bailment. It is the same if I make a contract by deed indented. I shall not be compelled to count on the indenture; for the contract is not determined upon (*sur*) the indenture, but con-

[1] Compare Newton, C. J., in 1444, at the end of a case in Y. B. 22 H. VI. 55, 32: "If one buy a horse of me for ten pounds, and deliver me a bond for ten pounds for the contract, it is a good bar in an action of debt, and, as regards the debt, is as strong as a release for all manner of actions."

[2] Fitz. *Dette*, 68, s. c. Y. B. 39 H. VI. 34, 46 (ed. 1689). Some older editions of this year book omit important parts of the case.

tinues, and a man may elect how he will bring his action." "To which," adds the reporter, "all the justices agreed."[1]

Whenever, therefore, the law requires, in any transaction, a formal document, the *carta*, it is demanding something more than written evidence; it is making *form* necessary, — as when a seal to a deed is required, or three witnesses to a will. As there is no will without the witnesses, and no deed without the seal, so the *carta*, and no part of it, can exist outside of the writing. And yet, from the nature of it, this sort of writing is also evidence, — as they used to say, it "testifies;" being in this respect different from the seal and witnesses.

As contrasted with this sort of thing, it is a *notitia*, a *memoratorium* only, that is called for when the English Statute of Frauds, in §§ 4 and 17, is content with "some note or memorandum in writing" of the agreements there referred to.[2]

II. Leaving, now, these discriminations, and coming to the precept itself, which goes by the name of "The Parol Evidence Rule," it is ordinarily said that in the case of contracts in writing, wills, deeds, and other solemn documents, parol evidence is not admissible to vary or add to their legal effect or to cut it down; and especially it is said that such evidence of the writer's intention is not admissible. In this expression, "parol" means what is extrinsic to the writing, and "evidence" means testimony or facts conceived of as tending to show what varies, adds to, or cuts down the writ-

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[1] It seems that one might count upon the specialty if he chose, and it "could not be disputed, unless by matter of as high a nature." Fitz., *Barre*, 19; s. c. 18 H. VI. 17, 8 (1439).

In 1522–1523 (Y. B. 14 H. VIII. 17, 6), in a long and interesting case, Brudnel, C. J., said: "Things which pass by parol are made subject to a condition, as well by parol as in writing; . . . for a deed is only proof and testimony of the party's agreement. As a deed of feoffment is only proof of the livery; the land passes by the livery, but when the deed and the livery coexist, it is a proof of the livery." Compare Saunders, J., in considering a deed of lease of land, in Throckmerton *v.* Tracy, Plowden, p. 161 (1556): "And he said he was of the like opinion that Brudnel seemed to be of in 14 H. VIII., that contracts shall be as it is concluded and agreed between the parties, according as their intents may be gathered. . . . And certainly the words are no other than the testimony of the contract."

[2] "The contract itself, and the memorandum which is necessary to its validity under the Statute of Frauds, are in their nature distinct things. The statute presupposes a contract by parol. . . . The contract may be made at one time, and the note or memorandum of it at a subsequent time." — *Hoar, J.* (for the court), in Lerned *v.* Wannemacher, 9 Allen, 412. That the "validity" of the contract is not touched by statutes like the English one, but only the remedy, see Townsend *v.* Hargrave, 118 Mass. 325; Maddison *v.* Alderson, 8 App. Cas., p. 488 (*per* Lord Blackburn).

ing, or to show the intention. The phrase parol or extrinsic evidence stands contrasted with that intrinsic evidence which is found in the writing itself. A careful scrutiny of the cases appears to show that the rule is aimed, not so much against offering evidence of anything, as against the thing itself that the evidence is offered to further; it is the varying, adding, and cutting down that is condemned, the trying to give to matter not in writing an equal effect and operation with that which has the written form; or, to speak more generally, the trying to give to matter which is not formal an equal effect with that which is formal, — as being recorded, or under seal, or witnessed, or merely written, whether the form be required by law, or merely by convention of the parties. There are questions relating to construction and to matters offered in aid of construction which I reserve for another article.

Let me illustrate these suggestions by considering their application to some well-known classes of cases.

1. Of recorded judgments it is said[1] that they cannot be "contradicted, added to, or varied by oral evidence." This appears to be only another mode of expressing the doctrine of the conclusive and binding quality of domestic judgments,[2] as regards all who appear upon the record to be parties and to be subject to the jurisdiction. Of the nature, and some of the limitations of this doctrine, a clear impression may be got by looking at two or three cases.

In a case where the defendant had pleaded to an action of debt on a judgment in the Court of Common Pleas, in another county, that at the time of the supposed service of the original writ on him, he was not and never had been an inhabitant of the commonwealth, had had no notice, and had not appeared to defend, the plaintiff demurred, and the plea was held bad: "The judgment declared on cannot thus be impeached collaterally by plea. . . . A writ of error lies to reverse the judgment, if erroneous. But until reversed it must be taken to be conclusive."[3] As to the scope of the general doctrine about the effect of judgments, it has been further said that, "when the cause is within the jurisdiction of the court, but the proceedings are based upon a defective writ, or are prosecuted without service of process, or notice upon the party to be affected, the objection is no more fatal to the jurisdiction and power of an

[1] Stephen, Dig. Ev., art. 90.

[2] "As a plea, a bar, or as evidence, conclusive," etc. — De Grey, C. J., in the Duchess of Kingston's Case, 20 St. Tr. 537, *note* (1776).

[3] Cook *v.* Darling, 18 Pick. 393.

inferior court than it is to one of general jurisdiction. In such cases a judgment in another State, even of a court of general jurisdiction, may be impeached by plea and proof, upon the ground of a want of jurisdiction of the person in the court rendering the judgment, Carleton *v.* Bickford, 13 Gray, 591. Domestic judgments, however, cannot be thus impeached collaterally by the parties thereto; not because of an apparent authority in the court to render the judgment, but because the remedy by review or writ of error is held to be more appropriate."[1] In Needham *v.* Thayer[2] the doctrine of Cook *v.* Darling[3] was overruled, as regards the particular ground of impeachment there set up, on the view that this was required by the Fourteenth Amendment to the Constitution of the United States; it was held that a defendant in an action of contract on a domestic judgment might plead and prove that he was not a resident of the State when the writ was served, and that he had no notice of the suit until the beginning of the present action. The case came up on exceptions to a ruling of the trial judge rejecting evidence of these facts. It was held that the evidence should have been received: "We are of opinion that [the defendant] had the right to impeach the judgment by proof of these facts." In other words, those facts were a good defence.

Qualifications of the doctrines above stated as governing in the case of domestic judgments, are recognized as applying in the case of judgments of other states of the American Union, notwithstanding the provision of its Constitution (Art. 4, s. 1) that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and to the acts of Congress passed in pursuance thereof.[4] In Carleton *v.* Bick-

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[1] Wells, J. (for the court), in Hendrick *v.* Whittemore, 105 Mass. 23.

[2] 147 Mass. 536.

[3] Supra.

[4] "These provisions of the Constitution and laws of the United States are necessarily to be read in the light of some established principles which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties. D'Arcy *v.* Ketchum, 11 How. 165; Thompson *v.* Whitman, 18 Wall. 457. And they confer no new jurisdiction on the courts of any State, and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other State than that in which the penalty was incurred. Wisconsin *v.* Pelican Ins. Co. [127 U. S. 265], above cited.

"Nor do these provisions put the judgments of other States upon the footing of domestic judgments, to be enforced by execution, but they leave the manner in which

ford,[1] in an action on a judgment of the Court of Common Pleas of New Hampshire, it appeared that the sheriff's return was recited in the judgment, showing personal service on the defendant. The defendant offered evidence contradicting this, and it was rejected. On a case reserved, the Supreme Judicial Court of Massachusetts held that it should have been received, on the ground that in such an action the defence is open that the court rendering the judgment had no jurisdiction of the defendant's person; and this, although the judgment recited the existence of the facts necessary to give it jurisdiction. And so it was held in Thompson *v.* Whitman.[2]

This slight statement of some doctrines relating to the effect of judgments and the way of impeaching them is sufficient for the present purpose. These are rules of the substantive law of judgments.[3] Yet it is common to attribute them to the law of evidence, and to express them by saying that the record is conclusive evidence, and that extrinsic evidence is not admissible to contradict it, and the like; as when in Wilcher et al. *v.* Robinson,[4] the court says: —

"If it be a judgment . . . of a domestic court of general jurisdiction, and the record declares that notice has been given, such declaration *cannot be contradicted by extraneous proof*. . . . The judgment . . . is sustained, not because a judgment rendered without notice is good, *but because the law does not permit the introduction of evidence* to overthrow that which for reasons of public policy it treats as absolute verity. The record is conclusively presumed to speak the truth, and can be tried only by inspection."

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they may be enforced to the law of the State in which they are sued on, pleaded, or offered in evidence. McElmoyle *v.* Cohen, 13 Pet. 312, 325. But when duly pleaded and proved in a court of that State, they have the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the State in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States. Christmas *v.* Russell, 5 Wall. 290; Green *v.* Van Buskirk, 5 Wall. 307, and 7 Wall. 139; Insurance Co. *v.* Harris, 97 U. S. 331, 336; Crescent City Co. *v.* Butchers' Union, 120 U. S. 141, 146, 147; Carpenter *v.* Strange, 141 U. S. 87." — Gray, J. (for the court), in Huntington *v.* Attrill, 146 U. S. pp. 685, 686, — a clear and powerful opinion upon an intricate subject.

[1] 13 Gray, 591.

[2] 18 Wall. 457.

[3] Such rules as have lately become the subject matter of a large and interesting treatise, Van Fleet on the Law of Collateral Attack on Judicial Proceedings. Callahan & Co., Chicago, 1892.

[4] 78 Va., p. 616.

The truth is that a certain defence, or answer to a domestic judgment is denied. There is a denial of the right to qualify the full verity and operation of such judgments, collaterally, as the phrase is. *If this defence or answer were allowed,* the evidence would be received. In a suitable direct proceeding, as by a writ of error or a motion to vacate the judgment, there is the right to ask the court that gave the judgment to annul it; and in such proceedings, where the facts impeaching the judgment are available, nobody ever heard that extrinsic evidence to prove the facts was not admissible. And so in any proceeding before any court, wherever such facts are in point of substantive law available, it is a mere matter of course that extrinsic evidence of them is admissible; as in several of the cases cited above.[1]

2. In Bates *v.* Tymason,[2] in an action for the breach of covenants in a deed, there was a question as to the true boundary of the estate conveyed, and a witness for the plaintiff (his grantor) was allowed to state what was said by the defendant, the original grantor, to be the true boundary, during the negotiations for his own purchase from the defendant. The defendant objected to the "parol evidence," but it was admitted in the Supreme Court. The case ultimately reached the Court of Errors,[3] and the decision was reversed; the chancellor (Walworth) remarking that the question was not what land Tymason intended to convey to May, but what land is covered by the description in the deed: "It is impossible for me to discover upon what principle May's testimony could be received as legal evidence to support the plaintiff's action. . . . Our recording Acts would afford no protection whatever to subsequent purchasers if the abuttals and boundaries contained in written conveyances should be considered as referring merely to what was supposed by the immediate parties to be the land described in the deed."

In such a case as this it is not the law of evidence that is applied, but the law of deeds; you cannot in effect add to a deed matter which has not the required form of a deed. In speaking of this as "parol evidence" it is in contradistinction to the deed itself, as being "written evidence." The requirement of a deed, and that deeds shall be in writing and duly executed, carries with it by im-

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[1] Carleton *v.* Bickford, 13 Gray, 591; Thompson *v.* Whitman, 18 Wall. 457; Needham *v.* Thayer, 147 Mass. 536. See the interesting case of Denton *v.* Noyes, 6 Johns. 294; compare Post *v.* Charlesworth, 21 N. Y. Suppl. 168.

[2] 13 Wend. 300 (1835). [3] 14 Wend. 671.

plication the rejection of anything extrinsic which is sought to be made operative as if it were in the deed. The difficulty is that the object for which the evidence is offered is illegitimate.

3. It is the Countess of Rutland's Case[1] that is so often cited to the rule that "parol evidence is not admissible to vary or add to a writing." But that case as regards this subject merely laid down a rule in the law of fines as to the declaration of the uses of fines; namely, the doctrine briefly stated in Jones *v.* Morley,[2] that if the fine be levied pursuant to a covenant declaring the uses, one cannot set up an intervening oral declaration of uses, or deny that the fine was levied to the uses declared in the covenant, unless, indeed, there be an intervening declaration by "other matter (than the covenant), as high or higher." Coke's report of the decision of Popham, C. J., goes on: —

> "For every contract or agreement ought to be dissolved by matter of as high a nature as the first deed. *Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est.* Also it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers and all others in such cases if such nude averments against matters in writing should be admitted."

It is the use of such matter, not the proving of it, that is objectionable. In like manner it is still a doctrine of the substantive law of contracts under seal that is asserted when, in conflict with some things said in this passage from Coke's Reports, we read in a late case (1879), Canal Co. *v.* Ray,[3] that "Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity. . . . The rule in equity is undoubted." And so in England, under the Judicature Act, a parol agreement "may be applied directly in answer to any proceeding upon the original deed brought contrary to the terms and faith of the agreement; the ancient technical rule of the common law that a contract under seal cannot be varied or discharged by a parol agreement is thus practically superseded" (Leake, Dig. Cont., 802). Whichever way the rule be, the law of evidence is untouched. The

[1] 5 Co. Rep. 25 (1604). [2] 2 Salk. 677 (1696-7). [3] 101 U. S., p. 52.

change relates to the possibility of using the parol agreement, even in case it were proved; not to the proving of it, but to the use of it as a defence or a ground of action.

4. And so in modern times when a like doctrine came to be applied as among "parol" contracts, by applying to "parol contracts in writing" the old doctrine and the old remarks [1] about "contracts in writing" in the sense of sealed writings, — it was still a doctrine of the law of contract. In Meres et al. *v.* Ansell et al.,[2] the court, without citing any authority, deals with a parol contract in writing as if it were protected by the rules applicable to a sealed contract. The defendants had contracted in writing for an exchange of certain property of theirs for the grass from Boreham Meadow, in the plaintiff's occupation. The agreement said nothing of a close called Millcroft, which was also in the plaintiff's possession. The defendants, claiming under the agreement the grass in Millcroft also, were sued in trespass for acts done there; and upon pleading not guilty and a license, were allowed by Lord Mansfield to prove that at the time of making the writing it was agreed orally that the defendants should have, not only "the hay from off Boreham Meadow, but also the whole possession of the soil and produce both of Boreham Meadow and Millcroft." On a motion for a new trial, on the ground of admitting this "parol evidence," the full bench of the Common Pleas granted a new trial, declaring "that no parol evidence is admissible to disannul and substantially to vary a written agreement; the parol evidence in the present case totally annuls and substantially alters and impugns the written agreement." Here again the trouble was with the agreement, and not the evidence; that the agreement was an oral one. Of course, if this agreement could not, even if it were proved, be used, evidence of it was inadmissible; but the inadmissibility is traceable to the substantive law, and not to the law of evidence.

In this last case the agreement seems to have been one where the fourth section of the Statute of Frauds required that either the agreement itself "or some memorandum or note thereof" should be in writing and signed by the party to be charged therewith, or some other person thereto authorized by him. The same statute, in § 17, as regards certain contracts for the sale of goods, required as one of several alternatives, not that the agreement be in writing,

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[1] *E.g.*, the passage above quoted from the Countess of Rutland's Case.

[2] 3 Wils. 275 (1771).

but that there be "some note or memorandum in writing;" and in § 5, in the case of all devises and bequests of real estate, that they should be "in writing and signed . . . and . . . attested . . . by three or four credible witnesses." While the statute, in requiring (in § 4) that if one would bring an action he should have a writing of the sort named, and (in § 17) a writing or one of the other alternative things, doubtless has an eye to simplicity and certainty of evidence in court, it is not merely looking out for that. For it is settled that the writing must exist at the time the action is brought, and that one obtained after that time, while perfectly answering any requirement of evidence, is not sufficient.[1] The statute, therefore, as has often been pointed out, seems, as touching the parts of it now in question, to be concerned in determining certain prerequisites to the bringing of an action. When it thus makes necessary the existence of a writing, it is only putting the same thing in other words to say that nothing but a writing will answer, and that all which the statute requires must be in writing. The real character of these propositions is obscured by phrasing them in terms of evidence, by saying, you cannot "have recourse to parol proof," you cannot supplement an insufficient paper by another "by means of parol evidence, which the statute forbids."[2] The true proposition is one of substantive law, viz., that a party cannot ground an action upon an agreement which is in the oral form, even if it be proved or admitted, unless there be also a note in writing existing when the action is brought.

5. The old doctrine, as has been said, which declared matter "in writing," *i. e.*, under seal, to be of a higher grade than parol, is extended in modern times to all matters, in the case of contracts and solemn instruments, which are in writing in our modern sense, *i. e.*, to all matter not oral; it is not now limited to what is by law required to be in writing. This application of the doctrine rests in part upon a supposed convention of the party or parties in putting the agreement into writing.[3] The doctrine is accordingly expressed in our books in a general form, thus: "Parol contem-

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[1] Tisdale *v.* Harris, 20 Pick. 9, p. 14; Bill *v.* Bament, 9 M. & W. 36; Gibson *v.* Holland, L. R. 1 C. P. 1; Lucas *v.* Dixon, 22 Q. B. D. 357; *Re* Hoyle, 67 L. T. Rep. 674.

[2] Curtis, J., in Salmon Falls Man. Co. *v.* Goddard, 14 How. 446.

[3] "We are of opinion that the rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement." — *Pollock, C. B.* (for the court), in Harris *v.* Rickett, 4 H. & N. 1.

poraneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."[1] "By the rule of law, independently of the Statute of Frauds, parol evidence cannot be received to contradict a written agreement; the instrument itself must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol."[2] The phraseology which introduces such a rule as this among rules of evidence is accounted for by observing again that the contract itself in its written form is called "written evidence." By a mere balance of phrase, the oral agreement is called "parol evidence." But the fundamental error of supposing that therefore the rules governing the oral agreement, and determining when and how far it is valid and available, are any part of the law of evidence, is indicated when one asks himself whether the phrase "written evidence" imports that the law relating to the nature, validity, and operation of instruments in writing is any part of the law of evidence.

6. But it is in the case of wills that one may see the most conspicuous illustrations of the error in question. The leading and very valuable little treatise by Wigram, already referred to, gives currency to it. Wigram made admirable contributions to the subject, but he accepted too readily the current language of the books, and did not discriminate between the rules of the law of evidence and the rules of construction and of substantive law which his book mainly serves to illustrate. He puts it (§ 2) as the object of his book to consider "under what restrictions is the admission of extrinsic evidence in aid of the exposition of a will consistent with the provisions of a statute which makes a writing indispensable to the purpose for which the instrument was made." If the subject were wholly free from any proper relation to the law of evidence, this language would be the less misleading. But it is not. As I have said before, there is at least one rule properly belonging to the law of evidence which is included within the scope of Wigram's discussion. The rest is of a different character, and the discussion of it all from the point of view of rules for admitting or rejecting evidence has contributed liberally to keep up the existing confusion.

Let me illustrate the way in which the law of evidence has been overloaded with matter belonging to the law of wills. No modern

[1] 1 Greenl. Ev. § 275. [2] Ph. & Am. Ev. 753.

case has figured more conspicuously as an illustration of the "parol evidence" rule than Miller *v.* Travers.[1] In reality, it decides no point at all in the law of evidence. A testator had devised, for the purpose of certain trusts, "all my freehold and real estates whatsoever situate in the county of Limerick and in the city of Limerick." So stood the duly executed devise. There was a mistake in it. In fact, the testator had no real estate in the county of Limerick, and only a small amount in the city of Limerick, — quite disproportioned to the nature of the charges laid by the testator upon the devised estates. He had considerable estates in the county of Clare, and it was these that he had meant to devise. A draft of the will had been submitted to the testator, and approved and returned by him, in which the devise ran, "all my freehold and real estates whatsoever situate in the counties of Clare, Limerick, and in the city of Limerick." While this was approved by the testator, some changes were ordered in other parts of the will; and this copy, with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer. The conveyancer, in redrawing the paper, by mistake and without authority struck out the words "counties of Clare," and substituted therefor the words "county of;" and thus the devise came into its final shape. When the testator received the new draft, he did not observe this change; and, after keeping the will by him for some time, executed it in its new and final form.

The plaintiff filed a bill "for the purpose of establishing the will . . . and carrying into execution the trusts thereof." The Vice-Chancellor directed an issue on the question "whether the testator . . . did devise his estates in the county of Clare and in the county of Limerick and in the city and county of the city of Limerick, and either and which of them to the trustees mentioned in his will and their heirs." On an appeal by the heiress at law, the Lord Chancellor reversed this decree. In arriving at this result, the Lord Chancellor (Brougham) had called in Chief Justice Tindal and the Chief Baron, Lord Lyndhurst. The opinion in the case is that of the Chief Justice, speaking for himself and the Chief Baron, — the Chancellor contenting himself mainly with adopting this opinion and decreeing accordingly.

It should be observed that there was no question of construction in the case; it was expressly declared by the Lord Chancellor and

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[1] 8 Bing. 244 (1832).

the Chief Justice that, as the case stood, no question was made as to "whether the whole instrument taken together, and without going out of it, was sufficient to pass the estates in Clare."

Now, it seems plain that here was an attempt to reform a will by adding to it words omitted by mistake. "It is not," said the Chief Justice, "simply removing a difficulty arising from a defective or mistaken description, it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up of a blank which the testator might have left in his will. It amounts, in short, . . . to the making of a new devise for the testator, which he is supposed to have omitted. . . . The effect . . . would be . . . that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed." These difficulties and objections arise in point of substantive law. They are not objections which have their root in the law of evidence or any of its rules. The point of them lies in the fact that the plaintiff is seeking to give the quality and operation of a devise to that which has not the form of a devise, or, in other words, is not and cannot be a devise. The fatal objection is not that the plaintiff's evidence is bad, but that his substantive case is bad; that he is trying *to do something* which is legally inadmissible, not that he is trying to do a permissible thing by means of evidence which is objectionable.

And yet, unhappily for the effect of this case upon the law, it has in it a suggestion of this last difficulty also: evidence inadmissible under the law of evidence was offered. None the less, however, is the true proposition of the case this: Whether the plaintiff's evidence be good or bad is immaterial; he cannot have an issue, because, however admissible it may be, and however full, it can do him no good. He is seeking to do a thing forbidden by law, — to give the effect of a devise to that which has not the required form of a devise.

Observe, now, how the case was handled. It was treated as turning entirely on a question in the law of evidence. It is best, said the Chief Justice, to settle the whole question now rather than to send the case to trial; "for if the evidence and the only evidence which can possibly be brought forward by the plaintiff . . . is of such a nature . . . as to be inadmissible at the trial," it is best to determine the matter now, "rather than that the very same question should be decided upon the very same principles of evidence by the judge at Nisi Prius after an expense and delay [etc., etc.].

The main question between the parties, and which has proved the principal subject of argument before us, is this, Whether parol evidence is admissible to show the testator's intention that his real estates in the county of Clare should pass by his will. . . . The great contention . . . is upon the question proposed above as to the admissibility of parol evidence with respect to the estates in Clare. This question arises upon facts either admitted or proved in the case which are few and simple. . . . The plaintiff contends that he is at liberty to show by parol evidence that the testator intended his estates in Clare also to pass under the same devise. The general character of the parol evidence which the plaintiff contends he is at liberty to produce in order to establish such intention in the devisor is this [reciting what is substantially given above]. It may be taken for the purpose of the argument that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the devisor to have been to include his estates in Clare in the devise. . . . Upon the fullest consideration, however, . . . admitting it may be shown from the description of the property in the city of Limerick that some mistake may have arisen, yet still, as the devise . . . has a certain operation and effect, . . . and as the intention . . . to devise any estate in the county of Clare cannot be collected from the will itself, nor without altering or adding to the words in the will, such intention cannot be supplied by the evidence proposed to be given."

The reasons for this conclusion are given thus: —

(*a*) It is true that where there is difficulty in applying the words of the will to the thing or person in the devise, you may remove "the difficulty or ambiguity which is introduced by the admission of extrinsic evidence" by producing further evidence "calculated to explain what was the estate, . . . or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, *Ambiguitas verborum latens verificatione suppletur.*" But this is limited to two classes of cases, neither of which include the present: (*a*) the case of a clearly expressed description. Where, however, it turns out that there are more than one estate or person "whose description follows out and fills the words used in the will," as the case of a devise to his son John, and he had two sons of that name, in such a case "parol evidence is admissible to show . . . which son was intended to take." (*b*) The other case is that in which the description of the person

or thing is "true in part, but not true in every particular," as where the estate is devised as estate A in the occupation of B, and it happens that the estate A is not wholly in B's occupation, or where the name is mistaken or the description imperfect. In this second class of cases "parol evidence is admissible to show what estate was intended to pass, or who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."[1] In the present case (the Chief Justice continued) neither of these things is true. This is not applying the words of the will to the estates in Clare, it is introducing new words and a new description into the body of the will itself. There is no ambiguity on the face of the will, and this extrinsic evidence produces none.

(*b*) The plaintiff, however, contends that he may prove the intention, "and that the will is to be read and construed as if the word Clare stood in the place of, or in addition to, that of Limerick." But this, it is manifest, is not using extrinsic evidence to apply an intention collected from the will to the property, it is using it to introduce into the will an intention not apparent upon the face of the will. But the rule for the construction of wills is clear, — that the intention must be collected from the words used in the will, and other words cannot be added. It is also setting up the unexecuted draft of a will against the duly executed will itself. If you can thus introduce new estates, why not new devisees? The cases support this view. The present case is substantially the same as if it were proposed to fill a blank where the thing or the name had been omitted. Especially is the case of Newburgh *v.* Newburgh an authority for the present decision, — where, upon the question "whether parol evidence was admissible to prove such mistake [an accidental omission of the word "Gloucester"], for the purpose of correcting the will and entitling the appellant to the Gloucester estates as if the word 'Gloucester' had been inserted in the will," the judges unanimously held that it was not.

Upon this line of reasoning the conclusion arrived at is again stated, that "the evidence offered by the plaintiff would be inadmissible upon the trial of the issue," and therefore that an issue would be useless.[2]

[1] In these remarks there is a failure to note the radical difference between these two classes of cases, clearly pointed out by Wigram in his little book, published only the year before. The "advertisement" (preface) is dated Jan. 1, 1831.

[2] Compare Lawrence *v.* Dodwell, 1 Lutw. 734 (1698), where, in an action of dower, there was a demurrer to the plea that a devise of land to the widow was made in lieu

The nature of the discussion in the case of Miller *v.* Travers may be indicated in a word by saying that it proceeds as if there had been a common law demurrer upon the evidence. Such demurrers came into existence before there was any law of evidence; they raised no question of evidence, but only a question of substantive law or of legal reasoning.[1] The question here was whether, upon the facts proposed, assuming them to be proved, it could be held that there had been a devise of the estates in Clare; and the answer was that it could not.[2]

6. This same confusion of a question as to what case a man has in point of substantive law, with the other question as to how he may proceed in proving the case, if he has one, appears in a great variety of other instances. It is easy enough to see, in cases not involving writings, that the long, gradual amelioration of law and legal procedure, allowing new grounds of action and defence, enlarging the scope of existing actions, and avoiding circuity, while it means admitting evidence which could not be given before, yet may involve no change in the law of evidence. New things may be done, and therefore new things may be proved; and if new things may be proved, other new things may be proved by way of meeting them. This was the whole significance of relief in equity, — what could not be done at law might be done there; and if so, then, of course, pleading and proof must correspond. Yet all this involved no change in the principles of evidence. This, again, is the import of the extension of equitable defences by statute and at the common law, and even of the whole introduction of new forms of action; namely, that things could now be done — *e.g.*, by set-off and counterclaim — which could not be done before; done in one way which could not be done in another. Whenever they can be done, of course they can be alleged and proved. In such cases, although the new state of things is often indicated by saying that

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of dower. The will did not say so. Treby, C. J.: "This averment is outside the will. If it had been said that the devise . . . was for her jointure, it would have been well. . . . No evidence outside the will can be admitted; for then one part of the will shall be in writing, and the other not. . . . It must be entirely in writing."

[1] 4 Harvard Law Review, 162.

[2] The true demurrer upon evidence, which assumed that all the evidence was admissible, affords an excellent working test to determine whether, in any given case, there be a question in the law of evidence or not. The modern substitute for the old demurrer (sometimes called by the same name), such as the motion for a nonsuit, may well enough leave open a question of evidence; namely, whether, upon the *admissible* evidence, there be any case. Not so in the older practice.

evidence of the new thing is admissible, yet it is plain that the real character of the change is not truly indicated thus. A change has taken place in substantive law or procedure; none in the law of evidence.

No less is this true as regards the same secular amelioration in law and legal procedure in its relation to writings. In Collins *v.* Blantern[1] it seems to have been first distinctly held that illegality of consideration not appearing upon the face of a bond, was a good defence. Such a bond, it was laid down by the court (Wilmot, C.J.), apparently upon a demurrer to the plea, is void by the common law. "The law will legitimate the showing it void *ab initio*, and this can only be done by pleading; . . . what strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say you shall not be permitted to plead the facts which clearly show it to be wicked and void." And so, fifteen years later, in Pole *v.* Harborn,[2] on a demurrer to a like plea, Lord Mansfield said: "There cannot exist such an absurdity as that a man shall not have a good defence to an action, and not be able to show or take advantage of it either by pleading or in evidence. . . . The foundation is that you shall not by parol impeach a written agreement, and say that the agreement was different; but, the agreement, being admitted, the party may come and show circumstances to vitiate the whole proceeding."[3]

[1] 2 Wils. 347 (1767).

[2] 9 East, 415, *n.*

[3] Six centuries ago the Statute of Fines, 1 Stat. Realm, 128 (1299), after reciting that parties have lately been allowed to set up certain defences to fines, enacts that hereafter no such exceptions or answers, or submitting them to juries, shall be allowed. During the period of the Year Books there was great rigor. "If a man," said Newton, C. J., in 1440 (Y. B. 19 H. VI., 44, 93), "levy a fine of my lands by my name, I shall have no other remedy than a writ of deceit, by which I shall recover damages according to my loss." To be sure, said Robert Danby, J., in 1455 (Y. B. 34 H. VI., 14, 36), "if there be two Robert Danbies, and one of them make conusance of a matter whereby I am damaged, I can show that I am not the person, but that there is another Robert." (Compare Cary, ed. 1650, 22, in 1602.) And in 1596, about the time that Bacon wrote his famous and much-misunderstood maxim about ambiguities, the new Lord Keeper, Egerton (Hubert's Case, Cro. Eliz. 531; s. c. 12 Co. 123), "said that he had always noted this difference: If one of my name levies a fine of my land, I may well confess and avoid this fine by showing the special matter, for that stands well with the fine; but if a stranger who is not of my name levies a fine of my land in my name, I shall not be received to aver that I did not levy the fine, but another in my name, for that is merely contrary to the record; and so it is of all reconusances and other matters of record."

But in 1596, in the case last named, the Star Chamber, "there being then in court the Lord Keeper [Egerton], Popham, Chief Justice, Gawdy, one of the justices of the Queen's Bench, and Walmsley, one of the justices of the Common Pleas, and

In like manner, when it is a question whether a writing complete in point of form was delivered, or ever took effect as a contract, deed or will; [1] whether, if it did, it is voidable for fraud,[2] or amendable for mistake; [3] whether, under a written contract, you can set up a substituted time of performance; [4] whether in case of a deed or written transfer, absolute in form, you can show that it was given as a security merely; [5] whether, under any circumstances, an indorser of negotiable paper in blank may set up an oral agreement that he was not to be under the usual obligations of such an indorser; [6] whether a principal not named is bound by an agreement in writing made by his agent, orally authorized, or can

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divers lords," punished one found guilty of procuring the personation of Alexander Gellibrand in a fine of his lands, and ordered that "the fine levied unto him should be void, if it could be so done, by entering a *vacat* upon the roll, or otherwise as the justices of the Common Pleas should best approve; and if it cannot be so made void, that then Hubert, by fine or otherwise, as Alexander Gellibrand should devise, should reconvey the land to him and his heirs in the same manner as it was before, or at the time levied." Popham, C. J., thought a *vacat* might be entered, avoiding the fine, and cited "the case of one Holcomb" where it had been done. The date of this last case was not given. "To warrant this, another precedent was shown, *tempore* Hen. 6." The Lord Keeper, after making the remarks quoted above, added: "But I conceive when the fraud appears to the court, as here, they may well enter a *vacat* upon the roll, and so make it no fine, although the party cannot avoid it by averment during the time that it remains as a record."

The direct defence or "averment" of fraud was distinctly upheld in 1601–1602, in Fermor's Case, in Chancery (3 Co. 77; s. c. 2 And. 176, Jenk. 253), where a lessee for years had levied a fine of the lessor's land. The Lord Keeper called for the opinion of the two chief justices; and after conference between them, "they thought it necessary that all the justices of England and barons of the Exchequer should be assembled for the resolution of this great case." The question, as Anderson's report tells us, was whether the plaintiff was barred by the fine, and if so, whether he could have relief in Chancery. The chief justices and all the others agreed that the fine did not bar the plaintiff. "And as to that which was objected, that it would be mischievous to avoid fines on such bare averments, it was answered that it would be a greater mischief . . . if fines levied by such covin and practice should bind."

Such a determination may well have been helped by the practice in Chancery of relieving against fraud in such cases by ordering a reconveyance. A case of that sort is reported as of May, 1595 (Welby *v.* Welby, Tothill, 99; 1 Cruise, Fines, 3d ed., 349).

Of course, in allowing new defences at law as against these solemn and sacred assurances, or new relief in equity, the substantive law of fines was changed; and it followed, as a mere matter of course, that the new matter could be pleaded and proved.

1 Pym *v.* Campbell, 6 E. & B. 370.

2 State *v.* Cass, 52 N. J. Law, 77.

3 Goode *v.* Riley, 153 Mass. 585.

4 Cummings *v.* Arnold, 3 Metcalf, 486.

5 Brick *v.* Brick, 98 U. S. 514; Campbell *v.* Dearborn, 109 Mass. 130.

6 Martin *v.* Cole, 104 U. S. 30.

recover on it, when under seal or when not under seal; [1] whether and how far you can "annex incidents" orally to a contract in writing; [2] and whether and how far, after an agreement in writing, you can use a contemporaneous, oral, "collateral" contract, as it is called,[3] — all these questions, and many more of the same sort, although persistently thrown into the form of whether parol evidence be admissible for such purposes, really present no point in the law of evidence. The true inquiry is whether certain claims or defences be allowable. If relief can be had in such cases, the law of evidence has nothing to say as to any kind of evidence, good under its general rules, which may be offered to prove these things. In so far as extrinsic facts are legally operative or available, extrinsic evidence is admissible to prove them.

7. It will perhaps help to place the class of questions now under discussion in their right point of view if it be observed that the older law and the older decisions relating to them were often mainly concerned in keeping matters out of the hands of juries. This motive appears in the language of the Statute of Fines (*ante*, p. 345 *n.*), and in that of the Lord Keeper (*ante*, p. 346 *n.*). Indeed, there is reason to conjecture that such a motive had its place in bringing into existence the English Statute of Frauds.[4] The notion, for instance, that absolutely and under all circumstances a fine or any other matter of record was beyond attack, belongs to a ruder period of jurisprudence than any known to our records. Always there was power in the Crown or "the king in parliament," or a regular power in the judges, to vacate and annul such matters.[5] Wherever and before whatsoever tribunal these things could be done, there the evidence was receivable which was necessary

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[1] Briggs *v.* Partridge, 64 N. Y. 357. "It is . . . difficult," says the court, "to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge, or vary a written contract." This form of expression disguises the true difficulty, that of allowing a recovery or a liability upon facts which only appear extrinsically, — a difficulty in point of substantive law. Once get over that, and the law of evidence interposes no obstacle.

[2] Brown *v.* Byrne, 3 El. & Bl. 703. Compare a discussion as to this sort of thing, where the contract was oral, in Gilbert *v.* McGinnis, 114 Ill. 28.

[3] Chapin *v.* Dobson, 78 N. Y. 74; Naumberg *v.* Young, 44 N. J. Law, 331. The last case puts forward a doctrine which appears to me an extreme and impracticable one; and so Browne on Parol Evidence, c. xii. This useful practical treatise has appeared since the present article was in type.

[4] 4 Harvard Law Review, 91.

[5] See a case in 1220 (2 Bract. Note Book, case 107), long before the Statute of Fines, where a collusive fine was quashed. See also 1 ib., Index, *sub voc.* Deceit.

to establish the basis of fact upon which the court was to act. But a jury in the days when they went on their own knowledge and were not regularly aided by testimony, when the doctrine of new trials had not developed, and the main hold upon the jury was through the attaint, was quite too rude a tribunal to deal with this sacredest thing in the law; it would have been preposterous indeed to let in such a body to revise the action of the judges in making record of what was done and established before them. This seemed less intolerable as time went on and jury trial developed; and, accordingly, modifications of the rule came in.

Some questions connected with the subject of the interpretation of writings, and with a rule of the law of evidence as to using extrinsic expressions of the writer's intention in aid of interpretation, must be reserved for another article.

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